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LABOUR, LOVE AND FUTILITY: PHILOSOPHICAL PERSPECTIVES ON LABOUR LAW

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INTRODUCTION

Writing in 2006 on the ‘philosophical foundations of labor law’, Horacio Spector offered the view that ‘the literature on the philosophical foundations of labor law is scant; the most interesting contributions appear in works that do not specifically address labor law, rather they address more general topics in moral and political philosophy’.¹ Spector described this feature of modern labour law scholarship as ‘surprising’.²

From a UK perspective, at least, this historical disengagement of labour law from philosophy is not so surprising. Labour law scholarship in the UK was rooted in a strong attachment to sociological methods of enquiry, and this was abetted by a strong disciplinary coupling between labour law and industrial relations for much of the twentieth century.³ Alongside this sociological orientation was a spirit of pragmatism amongst labour lawyers. This emphasised the unity of scholarship and policy activism in the public realm. The leading UK labour lawyers of the twentieth century were actively engaged in the practical problems of labour, concerned to use their scholarly knowledge to harness law as an instrument for improving the lives of workers. They were politicians, arbitrators, Royal Commissioners, judges in labour

¹ Horacio Spector, ‘Philosophical Foundations of Labor Law’ (2006) 33 Florida State University Law Review 1119, 1121.

² *ibid.*

³ Hugh Collins, ‘The Productive Disintegration of Labour Law’ (1997) 26 ILJ 295. Roger Undy, ‘An Overview of Bill McCarthy’s Academic and Political Engagement with Industrial Relations’ (2015) 46 Industrial Relations Journal 1. See also Roderick Martin, ‘The British Tradition of Industrial Relations Research: The Contribution of W.E.J. (Lord) McCarthy’ (1998) 36 British Journal of Industrial Relations 83.

courts. They were not philosophers. In this respect, labour law was an intensely ‘political’ discipline. There was little patience with abstract theorising for its own sake, which was an irritating distraction from the serious business of making the world a better place through law and politics. Finally, labour law was formed through the processes of social struggle between organised labour and employers, with the state acting as midwife. This was particularly striking in the UK, where industrial enfranchisement preceded the widening of the political franchise. British labour law was forged in the struggles of working people to achieve their dignity through their own efforts. It was not an intellectual exercise in rational codification of legal principles. This self-image of labour law fashioned through class struggle has left a vivid imprint in the collective consciousness of British labour law, and it was one that left little space for philosophy.

Over the last decade, there has been a growing interest in philosophical perspectives on labour law. Whether this is a sign of labour law’s health or sickness is an open question, though I take the view that the engagement has been a productive one. Political philosophers have been more focused on ‘work’ and its organisation in theories of justice, and this has no doubt contributed to the growing interest in philosophy as a tool of analysis in labour law. For their own part, labour lawyers are now more open to using philosophical material to refine their own positions on normative controversies in labour law. This article is offered as a modest exercise in proselytization. It will focus on three areas where philosophy has been relevant, organised under three short headings: labour, love and futility.

‘Labour’ is concerned with the identity of labour law as a legal discipline. How does a subject like labour law differ from the law of torts in terms of its internal unity and structure? This section explores how labour law might be understood as a coherent category of legal thought. Conventionally, this reflected the idea that ‘labour’ is an activity of particular value that warrants its own separate treatment as a body of legal norms. I suggest some problems with that approach, and suggest some alternative possibilities. ‘Love’ is concerned with the ‘autonomy’ of labour law from private law. Ernest Weinrib famously described private law as like love.⁴ This claim is exceedingly complex and somewhat obscure, but in part it is concerned to emphasise that private law has its own internal value and intelligibility. Often, this is based upon a contrast with disciplines such as labour law that are intelligible in light of external purposes. In ‘Love’, I explore the relevance of ‘corrective justice’ to labour law. I

⁴ Ernest J Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 6.

suggest that corrective justice advances our understanding of some core issues in labour law. I also explore the ways in which private law theories of corrective justice may themselves stand in need of correction, in the light of some examples of statutory torts from labour law. Finally, in ‘Futility’ I challenge the view that philosophical techniques have little practical contribution to make to the regulatory problems of labour law. Of course, the value of philosophy does not stand or fall in its cash value to resolving practical difficulties. Clarity and understanding is its own reward. Nevertheless, the final section explores some of my own work on freedom of association where philosophical analysis has been of real practical value in the very heartlands of doctrinal legal scholarship.

LABOUR

Perhaps the most basic problem in labour law is the question of what holds all of the different bits of the subject together as a coherent whole. Let us call this the coherence problem. To quote the great Tony Weir on the law of torts, the answer for us may be as simple as ‘Tort is what is in the tort books, and the only thing holding it together is the binding’.⁵ Certainly, labour law surely existed as a regulatory practice long before there was any serious effort to theorise its existence or identity. The growth of mass industrialisation, the organisation of the ‘working classes’ into labour movements agitating for legislation to regulate working practices, the involvement of lawyers in advising trade unions, employers and workers, meant that there was a rough consensus on the basic parameters of labour law as a set of legal practices. Labour law textbooks came to be structured around such matters as unfair dismissal, health and safety, non-discrimination, payment of wages, and the rights associated with trade unions. Most labour lawyers get on with their day job without fretting about coherence.

Still, there is value in reflecting upon labour law’s coherence. One of the landmark papers to do so was Hugh Collins’ ‘Labour Law as a Vocation’, where he related legal coherence to ‘an identification of the social *problem*, or family of *problems*, to be addressed’.⁶ On this approach, the point of law as a regulatory practice is *prophylactic*. It is natural to align this prophylactic account with the idea that (labour) law is an instrument, whose intelligibility lies

⁵ Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) ix.

⁶ Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 LQR 468, 473 (emphasis added).

in its goals or purposes.⁷ We might distinguish four distinctive approaches to framing labour law's 'family of problems', which then has important implications for the appropriate design of labour law's regulatory tools: power-based conceptions; wrong-based conceptions; rights-based conceptions; and status-based conceptions.

Power-based conceptions are concerned with the fact that 'inequality of power is inherent in the employment relationship—which explains the need to regulate this relationship and prevent abuse of power by employers'.⁸ Older theories framed this around 'inequality of bargaining power'.⁹ More recently, republican philosophy has focused on 'non-domination' as a framework for examining the nature of power.¹⁰ Wrong-based conceptions reorient labour law's normative map around the regulation of specific wrongs that arise in the employment context, for example the wrong of exploitation.¹¹ Rights-based conceptions are concerned to guarantee a set of fundamental or human rights.¹² Finally, status-based conceptions are concerned with some notion of equality of status between employer and worker. Different theories account for that status in different ways. Spector favours a Kantian 'equal autonomy' theory,¹³ whereas Fudge has defended an ideal of 'democratic equality'.¹⁴ There is now a rich literature on status-based conceptions of labour law.¹⁵ Labour law can be framed in a variety of ways that blend these different conceptions. For example, non-domination is a kind of civic status; it is acutely sensitive to power relations; and civic republican citizenship is constituted by the equal guarantee of republican rights.

Still, there is an analytically prior question, which is why these different goals should be contextualised around *work*. It is possible to approach these goals in a non-contextualised way. For example, 'inequality of power' is not a distinguishing feature of work relationships. We might invent a new discipline concerned with the legal regulation of private domination. This could examine the different doctrinal tools for securing non-domination in a diverse range of contexts, such as landlord and tenant, consumer contracts, employment, and family

⁷ Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016)

⁸ *ibid* 54.

⁹ Otto Kahn-Freund, *Labour and the Law* (3rd edn, Stevens 1983) ch 1.

¹⁰ Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

¹¹ Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015).

¹² Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

¹³ Spector (n 1) 1144–1147.

¹⁴ Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 132–136.

¹⁵ Samuel R Bagenstos 'Employment Law and Social Equality' (2013) 112 *Michigan Law Review* 225; Adelle Blackett, 'Emancipation in the Idea of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).

relations. This might be very productive at the practical level. For example, the development and refinement of a ‘sham’ doctrine in landlord and tenant relations might inform the development of legal techniques for tackling ‘sham’ arrangements in the employment context.¹⁶ We might think about the analogies between labour strikes, rent strikes, and consumer boycotts. It is also likely to be true of wrongs, fundamental rights and statuses that these concepts and categories recur across a range of contexts. For example, we might develop a ‘law of exploitation’ concerned to organise all of the legal materials relevant to tackling exploitation across criminal law, contract law, labour law, medical law and property law.

Yet labour law is a ‘contextual’ legal subject.¹⁷ A ‘contextual’ subject is one that tells ‘you all the law there is about the particular aspect of life which interests you. It is the function and virtue of these contextual categories that they collect together bits and pieces which are kept apart in other ways of dividing up the law’.¹⁸ This seems to be true of labour law, or media law, or family law, or sports law, or medical law. This still leaves the puzzle of how to identify which particular ‘contexts’ of life – in other words, which activities, institutions, or social practices – should interest us in this way. There will certainly be practical exigencies that sometimes make it a sensible way to proceed. Legal practitioners who advise workers and employers will need there to be labour law regardless of whether philosophers regard it as a coherent idea. Nevertheless, philosophical investigation could bring clarity to the task of identifying a coherent structure, to decide which bits of the world are properly within the province of labour law: volunteers and unpaid interns? The self-employed? Should we include social security and welfare systems within labour law? These are all important questions, and it would be more satisfying to have a reasoned explanation for inclusion or non-inclusion within the borders of labour law.

A legal scholar who has devoted much attention to this problem is Brian Langille. He is in favour of ‘contextual’ disciplinary boundaries. So which contexts warrant our intellectual effort to build a discipline? Why not ‘swimming pool law’?¹⁹ Or the law as it relates to

¹⁶ See, e.g., Anne Davies, ‘Sensible Thinking About Sham Transactions’ (2009) 38 ILJ 318.

¹⁷ Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 LQR 468, 473; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 298.

¹⁸ Peter Birks, *An Introduction to the Law of Restitution* (OUP 1985) 73–74, cited in Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 298.

¹⁹ Brian Langille, ‘Labour Law’s Back Pages’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (OUP 2006) 15–16.

hairdressing?²⁰ A new elective on hairdressing law would be unlikely to catch on, but why? Langille suggests that ‘there is something compelling, or deeply interesting, about this particular part of reality, something which makes it normatively salient and not simply another grain of sand on a very large empirical beach. It must be, in a word, important’.²¹ That seems right. There is something especially *important* about work (or ‘family’ or ‘medicine’) that warrants our intellectual attention to its legal regulation. That is not true of hairdressing or swimming pools. Nevertheless, there is a remaining puzzle in elucidating our criteria of ‘importance’ or, as Langille also describes it, ‘normative importance’.²²

‘Normative’ certainly denotes an evaluative judgement, though that does not mark a significant advance. Judgements of importance or significance are always evaluative.²³ This does not tell us what kind of evaluative. For example, Brian Leiter has argued that ‘epistemic’ values can establish criteria of normative importance, but those judgements are guided by ‘evidentiary adequacy (“saving the phenomena”), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth’.²⁴ By contrast, moral values would direct our attention to activities or practices that contribute to human flourishing. This methodological tradition is particularly strong in natural law theory. For example, John Finnis has argued that ‘no theorist can give a theoretical description and analysis of social facts [including law] without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness’.²⁵ This requires the theorist to adopt the ‘practical’ viewpoint, with practical reasoning structured by attentiveness to the forms of human flourishing, and the intermediate principles of morality.²⁶

Let us call this the ‘basic good’ theory of contextual legal subjects. Many legal scholars who support the idea of labour law seem to have this kind of approach in mind. There is something especially *valuable* about work, as a component of the flourishing life, that gives its legal compartmentalisation a special urgency. In this respect, it is like sports law, or family law, or medical law, which demarcate legal subjects around basic components of human

²⁰ MAJ Davis, *Law and Hairdressing* (MAJ Davis 1964).

²¹ Langille, ‘Labour Law’s Back Pages’ (n 19) 16.

²² *ibid* 17.

²³ Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) ch 3.

²⁴ Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 168.

²⁵ John Finnis, *Natural Law & Natural Rights* (2nd edn, OUP 2011) 3.

²⁶ John Finnis, ‘Describing Law Normatively’ in John Finnis, *Philosophy of Law: Collected Essays: Volume IV* (OUP 2011).

flourishing (play, marriage and child rearing, health and bodily integrity). Perhaps it is this ‘basic good’ approach that Langille appeals to in the idea of ‘normative importance’.

I think there are three main problems with this ‘basic good’ approach. First, some philosophical accounts of ‘basic goods’ are aligned with a ‘central case’ methodology. For example, John Finnis has defended the idea that goods such as ‘friendship’ display instances that are more or less focal or peripheral.²⁷ Casual or business acquaintances are a peripheral instance of ‘friendship’, whereas longstanding relations based upon deep mutual care and regard constitutes a focal case of ‘friendship’.²⁸ The focal case of a concept or good is a flourishing instance of it. Furthermore, the flourishing instance of a concept has explanatory priority in explaining the thing itself. To explain ‘father’, we would use the example of a good father. To explain ‘tutor’, we would use the example of a good tutor. And so forth. Finnis identifies ‘skilful performance in work and play for its own sake’ as one of his basic goods.²⁹ On this framing of ‘work’, allied with ‘play’ in Finnis’ account, the full goodness of work is realised by ‘engaging in performances which have no point beyond the performance itself, enjoyed for its own sake’.³⁰ Whatever the merits of this as an account of *labour*, it seems defective in explaining the importance of *labour law*. Otto Kahn-Freund famously observed that ‘a discussion of the legal framework of industrial relations must pay what to some readers may seem to be excessive attention to the abnormal, the pathological situation. Legal principles usually come into play when things go wrong’.³¹ Hugh Collins was to put the point a little differently decades later in using ‘social problems’ as the basis for labour law’s coherence. Labour law is generally concerned with the bad things that happen at work, and how to use law to repair or avoid those bad things, when good work fails to be realised. The focalisation of *good* work in Finnis’ account does not track the regulatory concern of labour law to repair the wrongs and harms of *bad* work.

Second, on some accounts of work as a basic good, work is conceived as an *activity* rather than a *relation*. Finnis’ reflections on the good of ‘play’ in the original text of *Natural Law & Natural Rights*, which would apply also to ‘work’, reveal the difference between ‘work as relation’ and ‘work as activity’: ‘The performance *may be solitary or social*, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad*

²⁷ On the notion of ‘central cases’, see Finnis, *Natural Law & Natural Rights* (n 25) 9-11.

²⁸ *ibid*

²⁹ *ibid* 448.

³⁰ *ibid* 87.

³¹ O Kahn-Freund, ‘Legal Framework’ in Allan Flanders and HA Clegg (eds), *The System of Industrial Relations in Great Britain: Its History, Law and Institutions* (Basil Blackwell 1954) 42-43.

hoc in its pattern'.³² It is of course perfectly conceivable that 'work' can be conducted as a solitary activity. Yet labour as a solitary activity would have little interest to the labour lawyer. Labour lawyers are concerned with the *relational* context of work. Inequality of power depends upon a relative balance of power between different parties. Wrongs such as exploitation depend upon an exploiter and an exploited victim. Rights depend upon a right-holder and a duty-bearer. And civic status is concerned with the reciprocal standing of citizens. Other 'basic good' accounts are better placed to capture this relational quality of work. For example, Nussbaum identified 'work' as a 'central capability', which involves 'being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.'³³ It also requires 'having the right to seek employment on an equal basis with others.'³⁴ This is more promising than Finnis' 'basic good' approach in explaining the relational character of work, and Nussbaum's choice to locate 'work' within the domain of the 'material' accentuates the economic basis of work as relation.

Finally, the *goodness* of work does not really capture why labour law is a contextual domain of such deep and enduring interest. I think that much of this is attributable to the moral ambivalence of work under prevailing economic arrangements. In their defence of the 'law of the labour market' approach, Deakin and Wilkinson suggest that 'the scope of our study is wider than that conventionally ascribed to the term "labour law" that is used to describe the forms of legal regulation of work relations which are found in market economies.'³⁵ Yet even their wider disciplinary conception is still constructed around the legal regime of 'work relations'. Deakin and Wilkinson are concerned with the norms and institutions that structure the transactional mechanisms for employment in market economies. This would encompass, for example, the relevant rules of company law, fiscal law, social security law, and even family law.³⁶ Even if work is a basic good, the legal structures that channel the organisation, coordination and supply of work in market economies are morally ambivalent. A decent and secure job is one of the constituent features of a dignified life. Yet the 'labour market' also brings in its wake profound risks of precariousness, poverty, abuse, social exclusion and exploitation. It is precisely this moral ambivalence of the legal institution of 'employment'

³² Finnis, *Natural Law & Natural Rights* (n 25) 87 (emphasis added).

³³ Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard UP 2011) 34.

³⁴ *ibid.*

³⁵ Deakin and Wilkinson (n 18) 1.

³⁶ *Ibid* 2.

that gives labour law (or the law of the labour market) its moral urgency as a regulatory activity.

In short, the ‘basic good’ theory suffers from three defects. First, it may be misleading to focus upon the goodness of work as the basis for labour law’s importance as a regulatory activity. Second, labour law is concerned with a relation rather than an activity. Third, the urgency of labour law’s regulatory tasks is impelled by the moral ambivalence of work relations in employment arrangements.

We make more progress, I would suggest, by adopting Timothy Endicott’s recent work on ‘evaluatively complex’ concepts and practices.³⁷ Endicott offers this as a supplementation to Finnis’ social and legal theory on ‘central cases’. According to Finnis, the central case of a concept is a flourishing instance of it. For Endicott, this creates a number of puzzles. One puzzle is how to make sense of truly vicious practices such as slavery or tyranny – what does flourishing slavery or tyranny look like? That need not detain us here. A more relevant puzzle is how to make sense of morally complex or ambivalent practices. This is a practice where the central case instantiates both specific goods *and* specific ills.³⁸ To demonstrate the point, Endicott uses the example of ‘democracy’. The notion of rule by the people and democratic autonomy is undoubtedly good in some respects. It ensures that governments are accountable to the wishes of the people, which restrain the abuses of public power that might otherwise occur. Democracy also embodies specific ills, such as the swaying of the masses by flatterers and rabble-rousers. It can also lead to irrational decisions, or outcomes that threaten the rights of minority groups. We need to understand what is good *and* bad about democracy in order to understand its central case.

I would suggest that employment can be understood as an ‘evaluatively complex practice’. This is reflected in the normatively complex role of the contract of employment, which still operates as the central institutional platform for the legal regulation of ‘employment’ in most developed countries. In his institutional account of the contract of employment, Simon Deakin has identified the morally complex role of the contract of employment in the conceptual map of labour law.³⁹ On the one hand, the contract of employment can be understood as an emancipatory institution, operating as ‘a vehicle for channelling and

³⁷ Timothy Endicott, ‘The Irony of Law’ in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2015).

³⁸ *ibid* 335–336.

³⁹ Simon Deakin, ‘The Many Futures of the Contract of Employment’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP 2002).

redistributing social and economic risks, through the imposition on employers of obligations of revenue collection, and compensation for interruptions to earnings'.⁴⁰ It also imposed 'limits on the employer's legal powers of command, limits which were given a contractual form as either express or implied terms'.⁴¹ On the other hand, the contract of employment also displays regressive features. At the same time that it limits the employer's legal right to command, it also constitutes the legal authority of the employer and the subordination of the worker through its integration of 'master-servant' norms into the structure of the contract of employment.⁴² It also reinforces the exclusion of 'non-standard' employment relationships from the scope of employment protection, with highly gendered consequences.⁴³ The moral complexity of employment is captured in Deakin's description that the employment contract 'spoke to the inclusive agenda of the welfare state' while at the same time being a 'source of anachronisms, confusions, and dysfunction'.⁴⁴ In other words, employment (and, relatedly, the contract of employment) is an 'evaluatively complex practice'. It must be understood in terms of the goods *and* ills that it instantiates.

This 'evaluatively complex' practice account should be preferred to the 'basic good' approach. It is concerned with *employment* as a relation rather than *labour* as an activity, and it exposes the ways in which employment is a complex social and legal practice that instantiates goods *whilst at the same time* instantiating ills. It is precisely because of the moral ambivalence of employment that labour law displays the prophylactic character with which we are very familiar. It also helps to account for the deep and perennial fascination with 'labour' or 'employment' as a contextual field of legal study, as distinct from swimming pools or hairdressing.

LOVE

Ernest Weinrib famously compared private law to love.⁴⁵ Like love, private law is its own end. To seek to understand love and private law in terms of extrinsic goals represents a failure to grasp the inner intelligibility of the thing itself. For Weinrib, the 'sole purpose of

⁴⁰ *ibid* 181.

⁴¹ *ibid*.

⁴² *ibid* 187.

⁴³ *ibid*.

⁴⁴ *ibid* 186.

⁴⁵ Weinrib (n 4) 6.

private law is to be private law’,⁴⁶ which is to ensure corrective justice in the bipolar relationship between a plaintiff and a defendant. This bipolarity is based in the relational character of private law. In a private law action, *this* plaintiff alleges that she has been wronged and suffered a rights-violation at the hand of *this* defendant. The plaintiff enjoys a power to go to a public court to seek redress from the defendant who has wronged her. The court may then provide an authoritative determination that there has been a rights-violation in a public trial, and if it does so it will order the defendant to rectify the injustice through the imposition of a legal remedy. This remedy corresponds to the rights-violation, and hence displays the same relational structure as exists between the right-holder and the duty-bearer. This corrective justice account of private law has been the dominant alternative to ‘functional’ accounts based in the ‘law and economics’ movement, whereby the doctrines of private law are evaluated on the basis of their deterrent effects, or allocating losses and liabilities efficiently, and so forth.⁴⁷

By contrast, labour law has generally been conceived in more functional terms. For example, Guy Davidov sets out a ‘purposive approach’ to labour law theory which is concerned ‘to articulate the goals behind labour laws, at different levels of generality/abstraction, and to suggest the best legal means to advance these goals’.⁴⁸ In an earlier work, Deakin and Wilkinson referred to the emergence of labour law as based in the creation of ‘purpose-orientated norms’ that dissolved the traditional classificatory divisions of private law and between public law and private law.⁴⁹ This functional theory of labour law is allied with the argument that ‘contextual’ subjects such as labour law are concerned with ‘distributive’ or ‘social’ justice, whereas private law is concerned with ‘corrective’ justice.⁵⁰ Distributive justice is concerned with ‘problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens’.⁵¹ The idea of a strong correlation between labour law and distributive justice is a natural one: ‘redistribution is strongly connected with the idea of inequality of bargaining power ... we redistribute in order to offset this inequality’.⁵² Many specific labour laws with which we are familiar, such as minimum wage regimes, collective bargaining laws, and anti-discrimination laws, can be

⁴⁶ *ibid* 8.

⁴⁷ *ibid* 4.

⁴⁸ Davidov, *A Purposive Approach to Labour Law* (n 7) vii.

⁴⁹ Deakin and Wilkinson (n 18) 301–02.

⁵⁰ *ibid* 302.

⁵¹ Finnis, *Natural Law & Natural Rights* (n 25) 166.

⁵² Davidov, *A Purposive Approach to Labour Law* (n 7) 59.

understood as norms of distributive justice that are superimposed upon the underlying private law category of contract.

It is now treated as axiomatic by most labour lawyers that the corrective/distributive justice distinction maps neatly onto the private law/labour law distinction. It must also be acknowledged that this demarcation still makes strong normative sense to labour lawyers. The emancipatory project of labour law was concerned to *re-order* the legal entitlements of employers and workers that had been established through the private law of contract, property and tort. These common law entitlements *constituted* the hierarchical relations of employment and the subordination of the individual worker. The historical legacy of ‘master and servant’, the deep inter-connectedness of private property and labour discipline, the use of the labour injunction to stifle collective action, all contributed to the strong normative identity of labour law as an instrument of distributive justice to counter the unjust exploitation of workers that was facilitated through private law categories. As Kahn-Freund put it, ‘it is important to an understanding of labour law to accept the limitations of the common law’.⁵³ In fact, for many labour lawyers, *the common law itself* was the very problem to be addressed. The radical disjunction between the free and independent agents who populate ‘Kantian’ theories of private law, and the subordinated worker exploited by her employer in capitalist modes of production, was sufficient to lead labour lawyers to turn their backs on private law and to reconfigure labour law’s vocation in strongly distributive terms. (Distributive) labour law thus emerged in opposition to (corrective) private law.

This strong bifurcation of private law and labour law was reflected in the eclipse of corrective justice theories of labour law. The philosophical foundations of labour law came to be influenced very heavily by public law theory rather than private law theory. In part, this may have reflected the fact that labour law was more usually a product of legislation rather than incremental adjudication in the common law courts. As statute law, it was thus more amenable to a ‘public law’ analysis because legislation ‘relates persons only indirectly through the collective goals determined by state authority.’⁵⁴ Mostly, however, the ascendancy of public law theory was attributable to the specific focus of the distributive agenda in labour law. In the formative period of labour law’s development, this agenda was less concerned with the redistribution of income and profits, and much more concerned with

⁵³P.L. Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens & Sons, 3rd ed 1983) 13.

⁵⁴Weinrib (n 4) 8.

the allocation of power and authority in the governance structures of enterprises and labour markets.

There was no single strand of influence, and the nature of the background theories of public law and governance differed across time and place. In Germany, for example, the work of Hugo Sinzheimer on the 'labour constitution' was highly influential in structuring reflections on the nature of labour law in the early decades of the twentieth century. According to Dukes, this theory of the 'labour constitution' implies 'a concern with questions of state ordering of the economy: with the role that law (and especially labour law) plays and could play in ordering, or constituting, the economic sphere, economic institutions, and economic actors. Normatively, the idea of a constitution is understood to imply, of itself, a concern with democracy and with the objective of identifying and achieving more democratic ways of doing things.'⁵⁵ In the UK, Otto Kahn-Freund developed his theory of 'collective laissez-faire' in a context that had been shaped by English political pluralism, and this underpinned his ideal of the 'pluralistic constitution' based upon the liberty of groups to be self-determining.⁵⁶ In the United States, Alex Gourevitch has traced the development and influence of theories of 'labor republicanism' and civic republican citizenship in the nineteenth century labour movement.⁵⁷ This civic theory of freedom provided normative support for a republican commonwealth of producer cooperatives.⁵⁸ While the normative and institutional differences across these different theories were striking, each reflected a common concern to democratise work relations.

Nevertheless, it must be questioned whether the expulsion of corrective justice from the domain of labour law should be maintained. Most labour law systems have a developed body of 'individual' norms that specify individual rights such as the right not to be unfairly dismissed, or the right to be paid a minimum wage, or the right to limits on weekly working hours. Where there are 'primary rights', must there not also be 'corrective justice'? Rather like the law of torts, the law of employment in the domain of individual rights might also be 'concerned with the secondary obligations generated by the infringement of primary rights'.⁵⁹ Wherever there are primary rights, infringement of those rights will generate secondary obligations on the wrongdoer to repair the infringement. In this way, the 'individual' bits of

⁵⁵ Ruth Dukes, *The Labour Constitution* (OUP, 2014) 5.

⁵⁶ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) chapter 1.

⁵⁷ Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (CUP, 2015).

⁵⁸ *Ibid* chapter 4.

⁵⁹ Robert Stevens, *Torts and Rights* (OUP, 2007) 2.

labour law are really a subset of the law of torts. Perhaps this is all true, but it might be objected that it fails to say anything very interesting. For example, one of the leading proponents of a rights-based theory of law of torts, Robert Stevens, has described corrective justice as ‘trite’, for corrective justice ‘solely explains the secondary obligations created by the infringement of primary rights. It would not offend this eviscerated form of corrective justice to abolish all of our primary rights. Given rights, their infringement will require correction.’⁶⁰ Given statutory employment rights, their infringement will also require correction. Corrective justice is trite here too, is it not?

It is true that some leading proponents of corrective justice go further and argue that the *content* of private rights is derivable from the relational character of private law. Others have been astute to observe, however, that ‘the current rights based interpretation of tort—the corrective justice one—is, because it *is* corrective, limited in the kinds of interests it conventionally recognizes and protects. Because it is corrective, it can only protect rights that are thoroughly negative in structure’.⁶¹ That would certainly be true of the list of private rights identified as immanent in the relational form of private law by Kantian scholars like Weinrib. These rights would *not* extend to the individual rights commonly recognised as at the very core of individual employment law. Perhaps that should not surprise us. Employment rights are typically statutory rights, and as Stevens has reminded us ‘the legislature can, and does, create rights for a wide range of reasons not confined to the question of fairness as between any two members of society.’⁶² This would certainly seem to be true for many employment rights, where the justification for the right is based in instrumental considerations of public interest, rather than confined to the narrower consideration of fairness between two parties in a bipolar relation. For example, the right to a minimum wage may be justified in part by the public interest in promoting a culture of decent treatment at work, and preventing bad employers from undercutting good employers.

Perhaps what is especially interesting about statutory rights (and thus statutory torts) in labour law is to understand their diverse justifications. This requires us to go beyond corrective justice, to examine the normative detail of the primary rights themselves. We should not be too quick to dismiss corrective justice, however. There are two important ways in which corrective justice contributes to our understanding of labour rights. The first is the

⁶⁰ Ibid 327.

⁶¹ Jean Thomas, *Public Rights, Private Relations* (OUP, 2015) 246.

⁶² Stevens (n 59) 328.

importance of providing individual victims of rights-violations with the normative power to pursue a remedy in a public court. This provides a critical perspective on regulatory systems, such as the US, where ‘unfair labour practices’ are treated as administrative breaches with enforcement in the hands of public agencies. The second is to provide an alternative perspective on the perennial problem of the ‘personal scope of employment law’, and it supports Mark Freedland’s recent attempt to reconceive of ‘personal scope’ as the ‘segmentation of workers’ rights’.⁶³ I will then briefly set out what I regard as the limits of a ‘private law torts’ model of labour rights. In essence, many employment rights do not seem to equate simply with private wrongs. Often, the relevant wrong has the quality of a ‘public wrong’, because the relevant rights are ‘public rights’. Or, at the very least, the labour right (and the corresponding wrong of its violation) displays both private *and* public dimensions. This has significant implications for the role of public courts and private arbitrators in adjudicating upon alleged violations of employment rights, and it provides a justification for wide standing rules for the enforcement of labour rights.

In what follows, it is important to emphasise the following. I am *not* arguing that functional or instrumental accounts of labour law are faulty or misplaced. Nor am I arguing that functional and corrective justice accounts are incompatible with each other.⁶⁴ Finally, I am *not* arguing that corrective justice can provide a complete account of labour law. For example, much of the detailed law on ‘collective’ issues, such as statutory trade union recognition or worker participation in corporate structures, is still better explained through a ‘constitutional’ or ‘public law’ lens. Instead, the task here is the rather more modest one of re-connecting with recent work in the philosophy of private law, to explore its potential (and its limits) for advancing our understanding.

Corrective justice and the individual normative power of enforcement

In Ripstein’s account of private wrongs, he poses the following puzzle for theories of corrective justice: ‘If corrective justice were concerned with achieving or restoring a pattern of holdings, then it would, indeed, be a mystery why litigation is initiated by the plaintiff

⁶³ Mark Freedland, ‘The Segmentation of Workers’ Rights and the Legal Analysis of Personal Work Relations: Defining a Problem’ (2015) 36 Comparative Labor Law and Policy Journal 241.

⁶⁴ It is perfectly possible to have a functional or instrumental account of tort law that also takes corrective justice seriously. For a discussion of instrumentalism in tort law theory, see J. Gardner, ‘Tort Law and its Theory’, available at <http://users.ox.ac.uk/~lawf0081/progress.htm>, accessed 30th September 2016.

rather than the state. If upholding justice is the state's responsibility, why leave any judicial matter to a plaintiff's initiative?'⁶⁵ Ripstein's response is that the victim's sovereignty in determining whether to vindicate her claim against the wrongdoer in a public court is a feature of private rights in general. This is because the wronged party's power to seek reparation in a court of law is a corollary of the position that 'the state takes no position on whether you should exercise your power'.⁶⁶ As with the exercise of your primary rights, so it is with your power to vindicate those rights if they are infringed by a defendant. The state stands ready to protect those rights if called upon to do so, but enforcement must be at the plaintiff's initiative. The injured party is left free 'to decide whether to stand' on her infringed rights.⁶⁷

It is easy, perhaps, to take underestimate the significance of this dimension of private wrongs. It may be taken for granted as a procedural truism and hence an uninteresting feature of the law of torts. In some labour law systems, however, the *absence* of a 'private wrong' perspective has had seriously deleterious effects on the rigour of legal protection for core labour rights. As an example, consider the legal protection of freedom of association in the US. It is based upon an 'unfair labor practice' regime, the broad structure of which was introduced in sections 7 and 8 of the National Labor Relations Act 1935 (herein after the 'Wagner Act' named after its sponsor, Senator Robert Wagner). Section 7 specified the fundamental associative rights of employees in the following terms: 'employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection'. These fundamental associative rights were protected by a set of 'unfair labor practices' that were enumerated in section 8.

The legal procedure is initiated by the filing of an 'unfair labor practice' charge, and this charge may be filed by 'any person, even a stranger to the dispute' and so 'need *not* be filed by the person actually aggrieved or adversely affected by the alleged misconduct'.⁶⁸ As such, the standing rules for enforcement of 'unfair labor practices' are extraordinarily wide. It is for the regional directors of the Board, acting under the authority of the General Counsel, to

⁶⁵ Arthur Ripstein, *Private Wrongs* (Harvard UP, 2016) 269.

⁶⁶ Ibid 271.

⁶⁷ Ibid 272.

⁶⁸ R. Gorman and M. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* (St Paul MN: West Publishing, 2nd edition 2004) 10.

determine whether an ‘unfair labor practice’ complaint should be issued against the party alleged to have breached the legal provisions. At this stage, the General Counsel ‘has plenary authority to determine whether an unfair labor practice complaint should be issued’.⁶⁹

This legal approach reflects the distinctive historical origins of the US statutory structure, where the Wagner Act was ‘enacted in an era of swelling confidence in the administrative state’ hence ‘it contains no private right of action.’⁷⁰ The decision to avoid private law enforcement perhaps also reflected ambivalence on the part of workers and trade unions about judicial involvement in the adjudication of labour relations disputes.⁷¹ The administrative character of ‘unfair labor practice’ proceedings has constrained the effectiveness of the remedial framework. As Estlund has explained: ‘The New Deal choice of administrative rather than judicial adjudication largely dictated the range of remedies: reinstatement, back pay, and other equitable remedies, but no compensatory or punitive damages of the sort that only juries could award.’⁷² In other words, to reconceive anti-union victimisation as a private wrong, governed by corrective justice norms, would significantly bolster the effectiveness of the current legal framework. It would restore standing to the individual victim of the wrong to seek remedies for its infringement in public adjudicative proceedings; and the norm of corrective justice would underpin the provision of more suitable remedies for the individual employee that are tailored to the infringement of her primary right.

Reconnecting the individual’s right to freedom of association with the corrective structure of private wrongs might have been productive in other ways too. Again, in her penetrating critique of the US regime of freedom of association, Estlund poses the following question: ‘What if labor law had kept up with the times and added a private right of action for anti-union discrimination that the law already condemns? We might have had a “common law” of anti-union discrimination, with cross-fertilization from other wrongful discharge doctrines. Imagine, for example, if the ban on employer discrimination against union members had given rise to a ban on “anti-union” harassment or creation of a hostile anti-union environment, much as Title VII’s ban on employer discrimination on the basis of sex gave

⁶⁹ W.B. Gould, *A Primer on American Labor Law* (Cambridge: MIT Press, 4th ed 2004) 60.

⁷⁰ C. Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010), 39.

⁷¹ Ibid.

⁷² Ibid.

rise to sexual harassment law.’⁷³ In other words, the exclusion of a private law analysis may have stultified the US law on freedom of association. Conceiving of unfair labour practices as administrative wrongs limits the scope for unfair labour practices to be shaped positively by the cross-pollination of substantive doctrines and remedial principles from the developing private law.

Corrective justice and the relational scope of employment law

The foundational doctrinal question in employment law is the issue of ‘personal scope’. We are concerned to identify ‘employees’ or ‘workers’ as a prelude to determining whether that individual is within the scope of statutory employment protections. The terminology of ‘personal’ scope is revealing. As Freedland has argued, this terminology of the ‘personal’ can be rather pernicious in its effects. It conveys the simple idea that we are in the business of identifying personal attributes, attached to specific roles, as the basis for determining whether X deserves legal protection as an ‘employee’ or ‘worker’ or so forth. This personalisation is problematic because, as Freedland suggests, these categories ‘are not in truth personal ones at all – they are descriptions not so much of persons themselves as of the relational capacities, and more particularly the contractual capacities, in which they arrange or engage work for others.’⁷⁴ As an alternative, Freedland invites us to dispense with the conceptual apparatus of ‘personal’ scope. He postulates an alternative conception that is *relational* rather than *personal*. It is captured in the alternative nomenclature of ‘segmentation of workers’ rights’.⁷⁵ This alternative conception is advantageous because it ‘makes the crucial point that it is an active process of assignment of workers’ rights rather than a purely passive recognition of where they are supposedly naturally located.’⁷⁶ In other words, the legal characterisation of personal work relations is a complex and active regulatory process, developed collaboratively between courts and legislators, that interacts dynamically with contracting practices in labour markets. The discourse of ‘segregation’ conveys the point that this regulatory process is concerned to confer (or withhold) rights across different work relations. This regulatory

⁷³ Ibid 40.

⁷⁴ Freedland (n 63) 244.

⁷⁵ Ibid.

⁷⁶ Ibid 247.

process has ‘rights-inclusionary’ *and* ‘rights-exclusionary’ effects on different relational categories of personal work.⁷⁷

Corrective justice provides further support for Freedland’s ‘relational’ conception. To ask whether X is an ‘employee’ or a ‘worker’ is problematic for the reasons outlined by Freedland. It is also odd because it ignores the other necessary half of the enquiry, which is to ask whether Y is the ‘employer’ of X. The relational idea of ‘bipolarity’ in the corrective justice model tells us why *both* parts of the enquiry are necessary. That is because the right-holder is connected relationally to a duty-bearer. In employment law, the relation between the employee and employer is simply shorthand for the relation of corrective justice between a right-holder and a duty-bearer. In normative terms, judicial determinations of ‘employment status’ represent an active regulatory choice to treat *this* duty-bearer/employer as answerable to *this* right-holder/employee.

This reframing of the normative enquiry from ‘personal’ to ‘relational’ scope has important practical implications. We can tease out these implications by considering the recent UK Supreme Court decision in *Jivraj v Hashwani*.⁷⁸ The Supreme Court had to determine whether or not an arbitrator was within the scope of the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660. A joint venture agreement specified that an appointed arbitrator in a commercial dispute was required to be a member of the Ismaili community. This certainly constituted direct discrimination because of a ‘protected characteristic’, in this case religion, in excluding non-Ismaili persons from the pool of arbitrators. The legal issue presented to the Supreme Court for determination was whether an arbitrator was engaged in ‘employment under ... a contract personally to do work’, in line with the definition under section 83(2) of the Equality Act 2010. This concept of a ‘contract personally to do work’ was the specific mode of rights allocation provided for by the legislation.

The Supreme Court adopted an approach that was based strongly on a ‘personal’ conception of scope. According to the Court, the correct enquiry was to ascertain whether:

⁷⁷ Ibid 249.

⁷⁸ [2011] UKSC 40, [2011] 1 WLR 1872.

... the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.⁷⁹

Since arbitrators operate independently of the control of the appointing parties, there was no ‘subordination’, and hence arbitrators were not within the scope of the equality legislation. The substantive structure of the enquiry was thus concerned to identify and track the personal and occupational attributes of the arbitrator, as a basis for concluding whether he is a worker employed under ‘a contract personally to do work’ and hence within the ‘personal scope’ of anti-discrimination law. *Jivraj* is a textbook example of the standard framing of the regulatory problem by the English courts as a ‘personal’ rather than ‘relational’ enquiry. It resulted in the exclusion of the would-be arbitrator from the scope of the anti-discrimination statute, fitting Freedland’s consequentialist concern that the effect of the ‘personal’ enquiry is often exclusionary in effect. Perhaps the most egregious failing of the ‘personal’ enquiry is that it is a simulacrum of the relevant normative enquiry. Whether and to what degree arbitrators are ‘subordinate’ is a distraction from the basic corrective justice question: whether *this* putative ‘employer’ owes a duty to *this* putative ‘worker’ in relation to a specific primary right (the right not to be discriminated against on grounds of religion or belief).

If we were to substitute a ‘relational’ enquiry for the standard ‘personal’ approach in cases like *Jivraj*, the courts would adopt a more ‘purposive’ and policy-oriented form of reasoning that focuses on the substantive justification of the right being claimed. In *Jivraj*, the basic question is whether the commercial arbitrator should enjoy a primary right, capable of being asserted against those who appoint arbitrators, not to be discriminated against on the grounds of religious belief. In his work on rights in private law, Nicholas McBride sets out a ‘balanced’ analysis of private law rights which provides a useful structure for a ‘relational’ enquiry.⁸⁰ McBride’s first condition in the ‘balance’ is the ‘benefit condition’ which is focused on the right-holder’s interest. This requires that ‘A should have an interest in B doing *x*’.⁸¹ On the facts in *Jivraj*, this would examine whether the arbitrator has a sufficient interest

⁷⁹ *ibid* [34].

⁸⁰ Nicholas J McBride, ‘Rights and the Basis of Tort Law’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012).

⁸¹ *ibid* 353.

in the commercial parties refraining from basing their appointment decisions on religious grounds. That might be the individual's interest in dignity and self-respect in a tolerant and pluralistic community. It might also be concerned with the harmful impact when citizens engaged in arbitration work are deprived of economic opportunities because of their religion. McBride's second condition is the 'burden condition' which is focused on the defendant's interest. This requires that 'Other things being equal, A's interest in B's doing x should be of sufficient importance that it justifies our imposing a duty on B to do x '.⁸² This condition recognizes that coercively enforced legal duties have an impact on duty-bearers by limiting their freedom. In addition to this general consideration, the specific right in *Jivraj* also interferes with the defendant's interest in maintaining close ties of religious kinship, as a component of well-being and personal identity.

McBride's third condition is the 'desirability condition', which operates as an additional public interest condition.⁸³ The 'desirability condition' blocks the legal recognition of a primary right where the recognition of A's right against B would have undesirable consequences for the wider public interest. In *Jivraj*, for example, there is a reasonable concern that bringing arbitrators within the scope of discrimination law would generate excessive cost and uncertainty by requiring commercial parties to seek a 'genuine occupational requirement' exemption to discrimination law norms on a case-by-case basis. Or we might be concerned that expanding the reach of equality law disrupts other important goods, such as the need to maintain space for 'autonomy' of religious groups in civil society. These public interest considerations may sometimes be of decisive importance in determining whether there is a relation between X as 'employer' duty-bearer and Y as 'worker' right-holder. The substantive content of those public interest reasons will be determined by the specific character of the primary right being claimed.⁸⁴

It may be that the 'personal' and 'relational' enquiries lead to the same legal outcome on certain facts. In *Jivraj* itself, for example, the structured 'relational' enquiry is rather finely balanced and may lead to the balance of 'benefit' and 'burden' reasons between the parties

⁸² *ibid.*

⁸³ McBride, 'Rights and the Basis of Tort Law' (n 80) 354.

⁸⁴ McBride also proposes two further conditions for the identification of rights, an 'uncertainty condition' and a 'voluntarist condition': McBride (n 80) 354-355. The 'uncertainty condition' requires that the satisfaction of the other conditions lead to a 'very clear' finding that the right is normatively justified; the 'voluntarist condition' would permit waiver of the primary right in certain circumstances. Both of these conditions are problematic in the context of labour rights, where ambiguities tend to be resolved in favour of the employee and voluntary waiver is contrary to public policy. This suggests that even if some employment rights are a species of private law rights, the particularities of the employment context mean that those rights should sometimes be treated differently.

being defeated by the public interest ‘desirability’ condition. The virtue of the ‘relational’ enquiry is that it does at least address the substantive questions that are relevant to the determination of the core right-duty correlativity. This correlativity lies at the normative centre of most disputes about the relational scope of employment rights.

How employment rights are different to private rights: the limits of the ‘private wrong’ analysis

The ‘private wrong’ analysis, at least in the hands of Ripstein, identifies two important elements to the role of the court. On the one hand, the court is identified as a ‘passive’ institution.⁸⁵ The state, including its system of public courts, takes no active role in ensuring that the victims of private wrongs seek legal redress. In fact, that is something the state takes no stand on at all. Victims of private wrongdoing may decide that civil litigation is not worth the hassle, or that it is better to forgive and forget, or that a public trial may reveal embarrassing facts in the course of proving the wrong.⁸⁶ From the court’s perspective, ‘the plaintiff must convince it to do something, and it takes no position on matters that are not before it. A court neither seeks that disputes be aired publicly nor demands that they be resolved.’⁸⁷ Indeed, the parties may frequently decide to submit their disputes to arbitration, precisely in order to avoid the gaze of state justice through public institutions. On the other hand, the court is a pivotal institution in the process of seeking legal redress for the violation of primary rights. Only a court has the authority to make binding determinations and to issue binding remedial orders.⁸⁸ The plaintiff is required to prove the elements of the legal wrong to the public satisfaction of the court, in accordance with the legal norms that regulate the civil justice process. In this way, a plaintiff ‘cannot compel the defendant to make it as if the wrong had never happened – except by enlisting a court, that is, a body competent to make binding determinations and orders.’⁸⁹

There are two ways in which the ‘private wrong’ analysis of the role of courts struggles with some familiar institutional features of labour law. First, there are situations where parties other than the primary right-holder have an important stake in the enforcement of the primary

⁸⁵ Ripstein (n 65) 272.

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid 273.

⁸⁹ Ibid

right. Sometimes those other parties may even have independent standing to enforce the primary right even where the primary right-holder is unwilling to do so. Second, the state often does take an active role in promoting the enforcement of employment rights, through the public provision of labour inspectorates and other public bodies charged with promoting compliance with labour standards. Furthermore, public policy in many jurisdictions is hostile to the provision of private arbitration as a substitute for public courts in adjudicating violations of employment rights.

Starting with the idea that employment rights might sometimes have ‘standing’ rules that empower other private parties to seek public enforcement of those rights, this seems scarcely comprehensible on the ‘private wrong’ analysis. Yet the existence of standing rules granting wider powers of enforcement for rights-infringements is a common feature in many employment law regimes. The Australian law on freedom of association provides an excellent example of this, where ostensibly ‘individual’ rights establishing freedom of association protections are supported by wide rules on standing to enforce those rights and supported by pecuniary penalties that have a collective dimension.⁹⁰ There may be good reasons for permitting the trade union the right to pursue a victimisation claim on behalf of an individual worker, even where the individual is disinclined to pursue her claim on her own behalf. This is because the linkage between the individual and collective interest is usually strong in situations of anti-union victimisation, the wrong to the individual (through the infringement of *her* primary right not to be victimised because of *her* trade union membership) being simultaneously an independent wrong against the group itself.⁹¹

The distinctiveness of employment torts is further supported by the role of state agencies and courts in the public enforcement of statutory employment rights. In his comparative history of the principle of state protection of workers through protective legislation, Thilo Ramm has argued that ‘the most important development was that of independent state inspectorates to

⁹⁰ A. Stewart, A. Forsyth, M. Irving, R. Johnstone and S. McCrystal, *Creighton and Stewart’s Labour Law* (Annandale: Federation Press, 6th ed 2016) 687-688.

⁹¹ It does not follow that a trade union should be permitted to waive or extinguish an individual claim against the wishes of the individual, where she has had her right infringed by the employer. This would constitute a serious failure of corrective justice in respect of the individual’s rights and their vindication.

enforce the legislation.’⁹² Originating in the introduction of factory inspectorates concerned with factories’ legislation, these inspectorates broadened their institutional remit over the course of the nineteenth and twentieth centuries.⁹³ This signalled that the enforcement of labour standards legislation was a matter of public concern, even where that legislation was concerned to formulate those standards as individual rights. Even today, the constitutional standards of the International Labour Organisation identify the Labour Inspection Convention 1947 (No. 81) and the Labour Inspection (Agriculture) Convention 1969 (No. 129) as ‘priority conventions’, given their importance to the ‘governance’ and effectiveness of international labour standards. The prominence of public enforcement has been particularly significant in recent years in equality law. In *Firma Feryn*, for example, the Court of Justice of the European Union permitted a claim for direct discrimination to be brought by the Belgian Centre for Equal Opportunities and Opposition to Racism where a firm had stated in job advertisements that it could not employ ‘immigrants’.⁹⁴ This was despite the fact that there were no identifiable individual ‘victims’ to pursue legal proceedings against the employer. This again reflects the fact that individual discrimination wrongs are simultaneously public wrongs, so that there is a public interest in using the legal system to address such wrongs. The state therefore has a responsibility to be ‘active’ rather than ‘passive’ in promoting compliance with equality rights.

Comparative work on the role of public courts and public justice in employment law also illuminates the limits of the ‘private wrong’ analysis in the employment context. On Ripstein’s approach, agreed private arbitration would represent a perfectly reasonable alternative to authoritative resolution through a public court. The position in many employment law systems is strikingly different. In Finkin’s comparative analysis of wrongful dismissal and the ‘privatization’ of protection through arbitral alternatives to public courts, he identifies a strong public policy in favour of maintaining exclusive jurisdiction for public courts in France, Germany and the UK.⁹⁵ This public policy orientation is based in the position that ‘the vindication of legal rights is best reposed in a public body: one whose

⁹² Thilo Ramm, ‘Laissez-faire and State Protection of Workers’, in Bob Hepple (ed), *The Making of Labour Law in Europe* (Hart, 1986) 108.

⁹³ Ibid 107-111.

⁹⁴ Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187

⁹⁵ M. Finkin ‘Privatization of Wrongful Dismissal Protection in Comparative Perspective’ (2008) 37 ILJ 149, whilst noting the exceptionalism of US law which adopts a highly permissive approach to private arbitration of wrongful dismissal claims.

competence in the law is assured, whose impartiality is above question, whose process is transparent, whose decisions are accessible and have broader legal and communal impact and which is subject to comprehensive public accountability.’⁹⁶ While a developed system of private arbitration, as in the sphere of commercial disputes, would no doubt satisfy the desiderata of impartiality and competence, it would seem that employment wrongs have a public quality that private wrongs may lack. For example, the widespread of violation of fair wages or non-discrimination norms may generate a culture of impunity for employers. This undermines the norms and practices of *decent* employment, which should be regarded as an important public good. This public dimension of the enforcement of ‘private’ employment rights explains the distinctive public policy that attaches to the preference for the public judicial role in employment disputes.

In my view, the benefits of a deeper engagement between labour lawyers and private lawyers go both ways. The torts of employment law should be given more attention by private law theorists. It is true that employment rights tend to be statutory in origin, and this marks out the main way in which employment law ‘torts’ are distinctive from most private law torts. Furthermore, the variety of normative justifications for these different statutory employment rights often appeal to more general conceptions of the public interest or common good, rather than being confined to fairness between the parties on the narrower Kantian view of private rights. However, statutes are increasingly a source of doctrinal development in the private law of torts. Any theory that fails to account for that fact by ignoring statutes is deficient as a general theory of torts.⁹⁷ Nor does there seem any reason to believe that the justification for all of the primary rights protected by the general law of torts *must* eschew broader considerations of the common good or public interest. But if it is true that some private rights are partly justified by broader public interests, then the idea that the state should simply be indifferent to the commission and repair of private wrongs through public institutions looks rather less convincing. In this way, labour law may provide interesting new material for theorists of private law to question their own assumptions about the nature of torts and the role of corrective justice.

⁹⁶ Ibid 164.

⁹⁷ James Goudkamp and John Murphy, ‘Tort Statutes and Tort Theories’ (2015) 131 *Law Quarterly Review* 133.

FUTILITY

The final section draws upon some of my own recent work on the constitutional adjudication on labour rights under general ‘freedom of association’ protections. This work has mostly developed in a critical dialogue with Brian Langille.⁹⁸ For my own part, that dialogue has been intensely fruitful and very congenial. It has mostly turned upon some philosophical arguments and distinctions, rather than on legal points of Canadian constitutional law. Our disagreements have centred upon the ‘constitutionalisation’ of the right to collective bargaining and the right to strike under the Canadian Charter’s general protection of ‘freedom of association’. The purpose of this final section is not to rehearse the detail of our arguments. Rather, it is to pose a direct challenge to those who regard philosophical argument as a futile endeavour that has little to contribute to the understanding or resolution of practical problems.

I think there are two variants of this futility critique. The first might be described as ‘militant empiricist’ concern. One version of this goes that, in labour law at least, empirical or ‘law in context’ research has methodological priority over non-empirical approaches. We need to understand how the real world of employment works before we indulge in abstract theorising. Normative philosophy is a distraction from more pressing empirical matters. The second might be described as the ‘scientism’ concern. It reflects a sense or expectation of what philosophy looks like, which is to resemble modes of analysis and argumentation in the natural sciences. This might make sense in the philosophy of mathematics or philosophical logic, but it makes less sense in ethics or political philosophy. Where ethical arguments take on the guise and form of ‘a biochemical protocol’,⁹⁹ we may question how useful this is in addressing the complex moral terrain of labour law. Law, like ethics, is (in Bernard Williams’ terms) a ‘humanistic discipline’. Scientism can appear cold, reductive and dehumanizing when it is brought to bear on reflecting in the round upon how we might live well as human beings in our various cultural contexts. I think that each of these concerns can be answered, though each operates as a valuable check on extravagant claims for what philosophy can achieve.

⁹⁸ For the signature piece, see Brian Langille, ‘The Freedom of Association Mess: How We Got Into It and How We Can Get Out Of It’ (2009) 54 McGill Law Journal 177. For my responses, see my co-authored piece Alan Bogg and K.D. Ewing, ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2012) 33 Comparative Labor Law and Policy Journal 379. More recently, Alan Bogg, ‘Subsidiarity or Freedom of Association? A Perspective from Labor Law’ (2016) 61 American Journal of Jurisprudence 143.

⁹⁹ Bernard Williams, *Philosophy as a Humanistic Discipline* (AW Moore ed, Princeton UP 2006) 184.

Futility and militant empiricism

Historically, a strong attachment to empirical methods was deeply embedded in the British tradition of industrial relations and labour law scholarship. It was captured in the adage of Lord McCarthy, one of the giants of 20th century industrial relations scholarship in the UK, that “‘an ounce of fact was worth a pound of theory’”.¹⁰⁰ More recently, Bob Hepple set out the case for ‘militant empiricism’ in the following terms:

‘The temptation for labour law scholars is to focus their energies on developing an ideal theory of labour rights or social justice. But any theory is sterile unless we first try to understand why real employers, workers, politicians, and judges act as they do in practice. Labour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships.’¹⁰¹

In my own work on the nature of freedom of association in constitutional adjudication, I (and others) have failed to resist the temptation in developing a normative theory of labour rights. Much of that attention has been on the constitutional propriety of developing a right to collective bargaining and a right to strike from the general protection of freedom of association. Theoretical disagreements have centred upon the following issues: (i) what is the distinction between ‘freedoms’ and ‘rights’? How does that distinction relate to the existence of correlative duties on other private actors? Are freedoms such as ‘freedom of association’ concerned with simple ‘freedoms’, or is ‘freedom of association’ shorthand for a complex structure of different jural relations that includes a collection of rights, liberties, and powers? (ii) Is it constitutionally reasonable to protect ‘inherently collective’ acts that are not simply reducible to an aggregative collection of individual acts?¹⁰² Could there be an ‘inherently collective’ form of strike action that is not simply reducible to individual withdrawals of

¹⁰⁰ Roger Undy, ‘An Overview of Bill McCarthy’s Academic and Political Engagement with Industrial Relations’ (2015) 46 *Industrial Relations Journal* 1, 2. See also Roderick Martin, ‘The British Tradition of Industrial Relations Research: The Contribution of W.E.J. (Lord) McCarthy’ (1998) 36 *British Journal of Industrial Relations* 83.

¹⁰¹ Bob Hepple, ‘Factors Influencing the Making and Transformation of Labour Law in Europe’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 30.

¹⁰² The notion of ‘inherently collective’ activity comes from Dickson CJ’s famous dissent in *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 SCR 313, 38 DLR (4th) 161 (known as the ‘Alberta Reference’).

labour but may be properly understood as the trade union's act? (iii) Are there 'group' rights for collective actors such as trade unions? (iv) If there are 'group' rights that correspond to 'inherently collective' acts, does this undermine the 'humanistic principle' that only persons and their individual well-being has ultimate value?¹⁰³ (v) What is the appropriate constitutional role for courts in developing constitutional rights that impose duties on other private actors? Should courts 'defer' to legislatures in democratic systems of government?

For what it is worth, I believe that freedom of association is a complex amalgam of rights and liberties rather than reducible to a simple 'liberty'; that it is constitutionally reasonable to protect 'inherently collective' activities; that there are group rights; that group rights to participate in 'inherently collective' activities are compatible with the 'humanistic principle'; and that constitutional principles of judicial deference do not preclude the formulation of rights to bargain collectively and to strike. Other scholars such as Langille disagree and have presented powerful arguments to the contrary.

In so doing, we have failed to observe Hepple's stricture because we have directed our intellectual energies on 'an ideal theory of labour rights or social justice'. Have our efforts at 'applied ethics' been 'sterile'? Others will be the judge of that. Suffice it to say that all of these questions seem to me to be pressing and reasonable questions to ask. They are also questions of great practical significance, for the answers to them have shaped the revolution in constitutional jurisprudence in Canada over the last decade. An empirical study examining 'why real employers, workers, politicians, and judges act as they do in practice' would not get very far in answering those questions. Nor is it clear that our endeavours in 'applied ethics' have been hindered by not starting *first* with this set of causal enquiries that Hepple regards as having explanatory priority, as Hepple seems to imply. The only methodological constraint is surely to use the methodologies best suited to answering the questions that you are interested in.

In fact, any kind of militancy in methodological choices seems more likely to obstruct than to advance our understanding. It is surely not coincidental that Hepple's reflections on general methodology arose out of a large-scale diachronic project in comparative law measuring patterns of development across European labour law systems. For these sorts of causal enquiry where we are ascertaining 'how labour law turns out at the level of legal and

¹⁰³ For a discussion of the 'humanistic principle' within the context of group rights, building on the work of Joseph Raz, see Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing 2011) 12.

institutional detail in various places at various times', a sophisticated empirical methodology is needed.¹⁰⁴ Furthermore, a legal realist research agenda examining the causal determinants of judicial decision-making would be amenable to empirical methodology. In this way, empirical or social scientific methods have an important role to play in addressing some central problems of labour law, such as the economic effects of labour laws, identifying causal properties in judicial decision-making, or measuring labour law changes over time.

These modes of enquiry should also be brought to bear on the current developments in Canadian constitutional law. How do we account for the shifts in judicial decision-making in Canada and elsewhere in the world in developing a purposive account of freedom of association that protects collective activities? Or what are the specific effects of decisions in constitutional courts on the behaviour of industrial actors and in respect of industrial relations outcomes? These are important questions that require an empirical methodology to answer them. Yet they do not seem any more or less fundamental than the philosophical questions about group rights, the nature of group action, or the nature of freedom of association as a complex right. Nor do these questions seem logically prior to more normative enquiries. Indeed, it may be that we will sometimes need concepts in place before empirical enquiries can proceed. As Hepple and Veneziani have observed 'a comparative historical study...rests on the assumption that a common definition of "labour law" can be found.'¹⁰⁵ This is unlikely to be a lexicographical undertaking, but will instead involve normative and conceptual analysis as a prelude to empirical study.

Futility and the 'scientism' concern

In his monumental work *Ethics and the Limits of Philosophy*, Bernard Williams famously criticised the reductive impulse that fuelled the emergence of systematic theories in modern ethics.¹⁰⁶ This rigid imposition of complete moral systems, such as utilitarianism or Kantianism, failed to do justice to the familiar moral experience of conflicting reasons and contingency in ethical affairs. This compression of our moral experience through theory was problematic because of the jarring disjunction between moral theory and the moral life: 'the

¹⁰⁴ B. Langille, 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (OUP 2011) 104.

¹⁰⁵ B Hepple and B Veneziani, 'Introduction', in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe* (Oxford, Hart, 2009) 12.

¹⁰⁶ Bernard Williams, *Ethics and the Limits of Philosophy* (WA Moore ed, Routledge 2006)

articulation of our moral sentiments does not necessarily obey these constraints, and to demand that they be schooled by the requirement of system is to alter our moral perception of the world, not just to make it in some incontestable sense more rational'.¹⁰⁷ Williams also explored the ways in which modes of argumentation and objectivity in scientific enquiry and knowledge did not provide an adequate model for the modes of argumentation and objectivity in ethics.¹⁰⁸ This conflation of science and ethics, which he describes as 'scientism', rests upon a serious mistake about the character of ethical enquiry. The difficulties and dilemmas of ethical life are hard, tragic and sometimes heroic. Values are complex, pluralistic and often dependent upon supporting social and cultural practices. In order to understand ourselves, we need to understand our social world and the ways in which that social world sustains some forms of value but not others. 'Thick' ethical concepts such as brutality, courage, honour, chastity and heroism, are evaluative concepts that have taken shape within a particular culture.¹⁰⁹ These 'thick' moral concepts may vary across different cultural contexts, sensitive both to time and place. Understanding ourselves in relation to those values is a fitting task for philosophy. It also requires us to engage with history, literature and cultural anthropology. Philosophical enquiry in ethics is thus continuous with other forms of enquiry in the humanities, and it invites us to consider human beings as they are situated in their particular social and cultural contexts.

This is all rather abstract. Yet I think that Williams' framing of philosophy as a 'humanistic discipline' may salvage philosophy from some common caricatures that may have damaged its standing amongst non-philosophers (including labour lawyers). To see how this might be so, it is worth reflecting upon Judy Fudge's powerful reminder that 'any normative theory or understanding of human rights is contestable, provisional, and contextual'.¹¹⁰ We *could* read this as an *anti*-theory rebuke. Yet we might also read Fudge's intervention as a powerful reminder of what a *good* normative theory might look like. On this reading of Fudge, her cautionary tone is very much in the spirit of Bernard Williams' retrieval of ethics from the trap of scientism. Normative theories of value (including theories of labour rights) must be 'contestable', 'provisional' and 'contextual'. To say that a normative theory must be 'contestable' and 'provisional' is an important reminder to all of us that we must engage in argumentation with certain intellectual dispositions – interlocutors must have intellectual

¹⁰⁷ Williams (n 99) 162.

¹⁰⁸ Williams (n 106) ch 8.

¹⁰⁹ *Ibid* 143-145.

¹¹⁰ Judy Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 CLP 267, n 136.

humility, be charitable to other arguments and theories, be amenable to new evidence that undermines one's own assumptions and argumentative premises, and above all we should open to persuasion by better arguments. This is surely true of any form of intellectual enquiry that is discursive.

The most interesting of Fudge's desiderata is the suggestion that a normative theory of human rights must be 'contextual'. What might this appeal to the 'contextual' in normative theory mean? To identify the significance of the 'contextual' in normative theories, we may return to the recent academic debates around 'freedom of association' in Canadian constitutional law. In *B.C. Health Services* the Supreme Court of Canada departed from its previous constitutional understanding of freedom of association as 'decontextualized'.¹¹¹ By 'contextualizing' freedom of association, specific instances of the exercise of that freedom could be identified as especially valuable and therefore warranting stronger constitutional protection. For example, an examination of the culture and history of a society might support the view that collective bargaining and strike action are associational freedoms of great and special significance in liberal democratic communities. Strikes have involved acts of heroic sacrifice and altruism for working class citizens engaged in industrial struggle. These narratives have been woven into the great works of the literary canon, which in turn reinforces the special cultural significance of trade union activities to freedom of association. For example, Elizabeth Gaskell's literary representation of the strike in *North and South* is a more penetrating examination of the difficult moral and legal policy issues of strikes than many academic treatises. In this way, the judicial adoption of a 'contextualized' approach provides recognition of the constitutive role of supporting social practices in the framing of a community's values. It is the reason why we might be more anxious to protect collective bargaining or striking through constitutional norms rather than protecting the ability of groups to count blades of grass or play snakes and ladders as a collective. Our social practices point towards the fact that there is something rather momentous in the freedom of workers to strike collectively. Furthermore, the state suppression of strikes is a momentous form of public coercion in liberal societies that should attract the most anxious constitutional scrutiny.

The 'contextualized' approach to liberal freedoms remains a matter of controversy. I think that part of the reason for this caution about contextualization is the worry that it collapses into a form of discreditable relativism. If there is 'Canadian' freedom of association, and

¹¹¹ *Health Services & Support-Facilities Subsector Bargaining Association v B.C.* [2007] 2 S.C.R. 391, para 30.

‘French’ freedom of association, and ‘Australian’ freedom of association, with each sensitive to variations in local cultural practices, does this not lead to the disappearance of some critical vantage-point for normative appraisal? Though there is insufficient space to develop the point, suffice it to say that there is a significant body of work in philosophical ethics that affirms the existence of value pluralism and the dependence of value on social forms and practices, whilst denying that this collapses into ‘relativism’. In Raz’s terms, this kind of value pluralism permits ‘diversity without relativism’.¹¹² Admittedly, this does allow for space for different societies to be identified with different valuations of associational freedoms. It may even be the case that for some societies the collective activities of workers and trade unions may not have the same significance that it holds for us. This is consistent with Williams’ view that ‘thick’ ethical concepts require social understanding in order for them to be understood, and that different communities at different times may, in virtue of their different histories, have very different ‘thick’ ethical concepts. This may also mean that moral appraisal only makes sense when a society is sufficiently similar to our own in respect of its social forms and practices.¹¹³

The relativism objection to ‘contextualization’ can therefore be addressed with some deft philosophical footwork. There is another and perhaps more unsettling feature of this style of philosophical reflection, however. In his commentary on Williams’ ethics, Moore has discussed the role of ‘confidence’ in ethical judgement: ‘confidence enables individuals to abide by their thick ethical concepts despite the unsettling effects of reflection.’¹¹⁴ Indeed, Williams suggests that reflection can destroy the ethical knowledge rooted in ‘thick’ ethical concepts. Rational enquiry ‘characteristically disturbs, unseats, or replaces those traditional concepts’.¹¹⁵ The line between reflection and confidence is a delicate one. At a recent workshop on the ‘Philosophical Foundations of Labour Law’, over lunch I revealed my longstanding sense that there is something odd about the very idea of a fundamental ‘right to strike’ in civilized societies. A political philosopher agreed, and observed that it would be a strange blueprint for a well-ordered society to create exploitative transactional mechanisms for work counterbalanced by protection of the rights of workers to inflict economic damage as a self-help technique. It would be far better to organize our productive economic activities in a humane and decent way to obviate the necessity for strikes. I think that he represented

¹¹² Joseph Raz, *The Practice of Value* (OUP 2003) 43.

¹¹³ Williams (n 106) chapter 9.

¹¹⁴ Ibid 243.

¹¹⁵ Ibid 164.

the intellectual disposition of ‘reflection’. A labour lawyer with communist sympathies gave a wry smile and insisted that a day of striking was a beautiful day; a day to dress up in one’s Sunday best and to enjoy the experience of solidarity. As I listened to him, I recalled the moving experience of reading the strike narrative dramatised in literary form in *North and South*. I think that he represented the intellectual disposition of ‘confidence’. ‘Contextualization’ is really ethics for grown-ups. It requires us to take responsibility in reconciling reflection *and* confidence in the formulation of ethical and legal judgments. It also prevents us from ducking the most difficult issues by relying on abstract formulae to crank out answers to our most pressing constitutional dilemmas.

CONCLUSION

Underlying all of the arguments here is a plea against *all* forms of methodological closure. In arguing for the value of philosophy as a methodology for labour law, it is important not to substitute one form of methodological ‘deafness’ for another.¹¹⁶ In no sense should any of this be read as an argument in favour of elevating philosophy over sociology, industrial relations, empirical legal studies, legal history, feminism and critical theory, or economics. There are many different paths to enlightenment, and which path you take will be determined by the questions that you are interested in answering. Scholarly traditions should be eclectic. Dogmatism is an intellectual vice, never a virtue.

In positioning ‘employment’ as a central organising category for labour law’s disciplinary unity, philosophical arguments only get us part of the distance. Those arguments will be enriched by a deep empirical familiarity with new forms of employment, often emerging through technological advancements, which in turn shapes our understanding of new forms of exploitation in work relations. In understanding the value and limits of the theory of corrective justice in labour law, openness in the dialogue between theorists of labour law and theorists of private law is generative of new insights within each disciplinary field. Finally, the call for ‘contextualisation’ in normative theory identifies the multiple ways in which ethics and political philosophy is continuous with other forms of enquiry in the humanities, such as literature, history, geography and cultural anthropology. As Bernard Williams often emphasised, *sub specie aeternitatis* is rarely the most suitable perspective for understanding

¹¹⁶ On the idea of ‘deafness’ to rival methodologies as a form of disciplinary closure, see Collins (n 3).

human beings.¹¹⁷ Nowhere is this truer than in our endeavour to make sense of the human encounter with work.

¹¹⁷ Bernard Williams and JJC Smart, *Utilitarianism: For and Against* (CUP, 1973) 118.